repudiation to take, without prejudice to his rights or power, a reasonable time within which to make his election. This is the holding in the principal case. And the opinion properly stresses that the exercise of this privilege must not, until the expiration of that reasonable time, be confused with an election *not* to accept the repudiation. If there had been no repudiation by the plaintiff here, such a failure as the defendant's, to perform an installment or a part of the contract which went to the root of the contract, would have given the plaintiff (a) a right to damages for breach of the installment—see *Gerli v. Poidebard Co.* (1895, Ct. Er.) 57 N. J. L. 432, 31 Atl. 401—and (b) a privilege of refusing further performance himself, together with a right to damages for breach of the entire contract,—*National Machine & Tool Co. v. Standard, etc., Co.* (1902) 181 Mass. 275, 63 N. E. 900—and finally, (c) a privilege and power to waive (b) without affecting (a). *Garfield, etc., Coal Co. v. Fitchburg Ry. Co.* (1896) 166 Mass. 119, 44 N. E. 119; see Pollock, C. B., in *Hoare v. Rennie* (1859, Ex.) 5 H. & N. 19. What effect did the plaintiff's prior repudiation have on the above? The defendant and the court assumed—and it is believed, properly,—that repudiation did not affect (a): the defendant's duty to make up in damages for failure to pay the price of the *installment* of goods delivered and accepted. But the prior repudiation was rightly held to keep the consequence (b) from attaching to the defendant's refusal to perform his installment during the reasonable time described above under (3): that is, he did not, while deciding whether to accept the unwithdrawn repudiation or to reject it definitely, become liable for breach of the contract as a whole by his holding up temporarily a payment which he was ready to make, if the plaintiff should decide to go ahead with the contract. This is sound sense and sound law. See *Sperry & Hutchinson Co. v. O'Neill-Adams Co.* (1911, C. C. A. 2d) 185 Fed. 231; *contra Zuck v. McClure* (1881) 98 Pa. 541, *semble*. It is submitted, moreover, that the court properly decided that the efforts of the promisee to induce the promisor to revoke his repudiation constituted no "waiver," and in no way altered the above operative effects of that repudiation. *Cf. Sperry & Hutchinson Co. v. O'Neill-Adams Co., supra.*

CONTRACTS—OPTIONS—"DOUBLE OPTIONS."—Mrs. S. for valid consideration made an agreement with one C. regarding certain of her real estate, "meaning thereby to give to the said A. R. Carrano the option upon the purchase of said property [at an agreed price] if the said parties of the first part [Mrs. S. and son] at any time desire to sell said property." Mrs. S. brought suit nine years later to have the agreement cancelled and her property freed from any incumbrance by reason thereof. *Held,* that the agreement, a "double option," under which the plaintiff might elect to sell or not to sell, be cancelled, as after nine years it was to be presumed that she had elected not to sell at the price. *Saraceno v. Carrano* (1918) 92 Conn. 563, 103 Atl. 631.

See COMMENTS, p. 65.

COURTS—ADVISORY OPINIONS OF JUDGES—NECESSITY OF ACTUAL LITIGATION.—The State Industrial Commission of New York, being in doubt whether it had power to adopt and put into execution a certain resolution, certified the question of power to the Appellate Division. The Appellate Division, acting under what it believed to be a duty imposed upon it by the state statutes, answered the question in the affirmative. Certain persons who had been permitted to intervene and file briefs as interested parties asked for leave to appeal to the Court of Appeals. This leave was granted. *Held,* that the Appellate Division was not

authorized to give the advisory opinion. *In re Workmen's Compensation Fund* (1918, N. Y.) 119 N. E. 1027.

The decision is based primarily upon the ground that, under the correct reading of the statute concerned, the Industrial Commission could certify questions of law to the Appellate Division only when they were incidental to a pending controversy with adverse parties litigant. The larger part of the admirably brief and concise opinion of Cardozo, J., is devoted to a review of the authorities and discussions relating to advisory opinions, and follows what may be called the orthodox view, viz., that the legislature cannot, in the absence of express constitutional authority, impose upon the courts the non-judicial function of answering questions of law apart from actual litigation. In justification of this view the opinion says: "The proposed resolution may be valid as to some . . . and invalid as to others. We are asked by an omnibus answer to an omnibus question to adjudge the rights of all. That is not the way in which a system of case law develops. We deal with the particular instance; and we wait until it arises." The point of view of the common law lawyer has perhaps never been better expressed. Whether this system has given results as excellent as past generations of lawyers would have us believe may be open to question, but that it is our system is beyond dispute. The arguments in favor of calling upon the American judiciary for advisory opinions on constitutional questions, as well as the history of the subject, are fully presented by Professor Albert R. Ellingwood of Colorado College in his recent book, *Departmental Co-operation in State Government*, a review of which will appear in the December issue of the YALE LAW JOURNAL.

HUSBAND AND WIFE—SEPARATION AGREEMENTS—EFFECT OF SUBSEQUENT MISCONDUCT BY WIFE.—A husband and wife agreed to live apart, the husband promising to pay the wife for her support a definite sum weekly. Subsequently the wife committed adultery and the husband refused to make payments falling due thereafter. The wife sued to recover such payments. *Held*, that the misconduct of the wife was a defense to the suit. *Devine v. Devine* (1918, N. J. Ch.) 104 Atl. 370.

On the same facts the English courts permit a recovery. *Jee v. Thurlow* (1824, K. B.) 2 B. & C. 547; *Sweet v. Sweet* [1895] 1 Q. B. 12. The New Jersey court gives two reasons for holding the New Jersey law to be different from the English law. One is that in England agreements of this kind are prepared by skilled solicitors who embody *dum casta* clauses in the agreements, so that omission of a clause of that kind may well be held to signify that the husband agrees to pay even though the wife misconduct herself. The other reason is that a separation agreement has under New Jersey law legal effects which differ in important respects from its effects under English law. According to the latter the separation agreement is a contract with all the usual legal consequences. *Besant v. Wood* (1878) 12 Ch. D. 605, and cases there cited. According to the New Jersey law, however, while such an agreement confers upon each of the parties a legal privilege to live apart from the other, thus putting an end to the previously existing legal duty to live with the other, it is, nevertheless, "revocable," *i. e.*, the legal privilege of each is subject to a legal power in the other to terminate the privilege by suitable notice and so to bring into existence again a duty to live with the other spouse. This rule apparently has been adopted in New Jersey on the ground that it is contrary to public policy to give to the separation agreement the consequences attached by English law. It follows that the agreement of the husband to make the stipulated weekly payments has legal effects comparable to those resulting from a continuing offer, revocable